

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,750

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision by the Department of Aging and Disabilities finding that he sexually exploited a man with a mental disability.

FINDINGS OF FACT

1. The petitioner and his wife have operated a residential care home for disabled adults for eight years. His wife is licensed to operate this home by the state and they both work in the facility. Ninety percent of the twelve residents in their residential care home are mentally disabled.
2. Some of the patients in the facility require personal care such as bathing but the petitioner himself is not allowed to give that care. The petitioner was notified in writing some two years ago by the state licensing division that he was not to give residents baths after complaints were received by the state from several residents about being bathed by the petitioner. The petitioner was aware of and agreed to that restriction.
3. R.P. is a thirty year old man who is a long-term resident of the Vermont State Hospital and who has paranoid schizophrenia. While he lives in a supervised setting, he does not need help with his personal care. Both the hospital and R.P. are anxious and excited about finding him a placement in the community. With the assistance of his case manager, R.P. has been visiting various placements in the community over the last year. He visited the petitioner's facility during the winter of 1994-1995, on several occasions (at least four or five), including overnight visits. On February 12, 13, and 14, 1995 R.P. was a weekend guest at the petitioner's facility. The purpose of the visit was to learn more about the facility and to assist in his adjustment there.
4. At the end of each of his visits, R.P. was picked up by his case manager whom he has known for about fifteen years. During the first few visits at the petitioner's facility, R.P. expressed a good deal of

enthusiasm for the placement to his case manager. He liked the cooking, slept well there and liked the petitioner although he thought he was overly friendly. He was leaning towards a placement at the petitioner's facility. Following the three day visit in February of 1995, however, his mood changed. He immediately informed his case worker that he did not want to come back to the facility. He became increasingly angry during their conversation on the drive home and suddenly blurted out, "I can take my bath--don't need [petitioner] to give me a bath." He said nothing further during the car ride.

5. Back at the hospital, R.P. told his case manager in response to his inquiry for further information that the petitioner had forced him to take a bath and that during the bathing, the petitioner had fondled his genitals. He also told the case manager that the petitioner had tried to put his hands down his pants on the ward on one of those three weekend days. He reiterated that he was never going back to the petitioner's facility even though he wanted to leave the hospital very much.

6. In the fifteen years in which he has known R.P., the case worker could not recall that he had ever made such an accusation against anyone. The change in his mood and his anger convinced the case manager that something had gone wrong during the visit and he reported R.P.'s statements both to R.P.'s treating psychiatrist and to the DAD investigative unit on February 17, 1995.

7. The DAD investigator interviewed R.P. and his case manager. The petitioner was interviewed by the police department and a transcript was made of the interview which was reviewed by the investigator.

8. The investigator was told by R.P. that the petitioner put his hands down his pants on February 12 when they were standing in a hallway and R.P. said that he flinched because he was not wearing underwear. Later during the visit, he said that and the petitioner forced him to go into the bathroom to take a bath although he had said he did not want to go. He also said that the petitioner stayed in the bathroom to assist him with the bathing even though he told him he did not need help and asked him to leave the room. During the bath, R.P. said that the petitioner pushed back the foreskin on his penis and washed it and stroked it. He said that he did this several times during the bath. He also said that when he got out of the bath, the petitioner dried him off, including his buttocks.

9. The petitioner admitted to the police that he did give R.P. a bath and did clean R.P. off, including washing his penis, pulling back and washing the foreskin for "medical reasons" and drying his body. He denied that R.P. asked him to leave the room or resisted the bathing in any way. He also denied placing his hands in R.P.'s pants. The only time he could recall touching R.P. was when he pushed on his stomach when he kidded him about having a "big belly."

10. Based on this information, the investigator substantiated the incident and placed a finding in the record. That finding was appealed by the petitioner because such a finding would preclude him from working in his wife's (or anyone else's) residential care home. The matter was reviewed by the Commissioner at a hearing which included the petitioner and his wife. In addition to the testimony given to the police officer, the petitioner added that the petitioner had asked him to give him the bath and had asked him to put bubble lotion in the bathtub as well. His wife agreed that she had heard R.P. make this request. The Commissioner, after reviewing this new information and the rest of the information in the file, decided to accept the recommendation of the investigator to substantiate the allegations of exploitation. The petitioner was advised of that fact in writing on June 5, 1995.

11. Both the petitioner and R.P. testified again at the hearing. R.P. stated again that he did not want to take the bath and did not need help taking a bath. However, he says the petitioner insisted that he take a

bath on the third day that he was there and would not let him take it alone. He said that when the petitioner put his hands in the water to touch his penis he said that he did not like it but the petitioner kept putting his hands in and out of the water. He also said the petitioner put his hand down his pants and rubbed his leg during the visit and that he told the petitioner not to do that again or he would "press charges". During the hearing, he apologized to the petitioner for the trouble this had caused him and stated that he hoped there were no hard feelings.

12. At the hearing, the petitioner completely denied putting his hands down R.P.'s pants and said again that he only touched his stomach in a teasing gesture before they sat down to eat. He stated that each resident bathes three times per week and that the showers were broken. He said that R.P. wanted to get into the tub as everyone had done and asked the petitioner to wash his back and hair. Although he was aware that he was not supposed to wash patients and did not think that R.P. needed assistance, he decided to help out and acquiesced in R.P.'s request, calling himself "a good-natured slob." He admits that he went ahead and washed R.P.'s whole body including his penis and denied that R.P. ever asked him to stop. He denied pushing back his foreskin to wash underneath. After the bath, he dried his head, back, both legs and between his legs and his rear end. The petitioner did not call his wife to corroborate his testimony.

13. The testimony of R.P. with regard to what occurred is found to be entirely credible. Although the petitioner was able to describe the event only in very simplistic language, he nevertheless consistently repeated the same story on at least three occasions, including under oath at the hearing. The fact that he was given a bath by the petitioner and was touched on the penis by him was corroborated by the petitioner himself. His claims that he was forced to take a bath against his will and that he protested against the petitioner's bathing him are also found credible in light of the petitioner's lack of need for personal care, his traumatized reaction to the incident as described by his case manager and the fact that the complaint against the petitioner was against R.P.'s strong interest in moving into the facility. The latter two reasons also makes R.P.'s allegation that the petitioner put his hands down his pants credible as well.

14. The petitioner, on the other hand, did not present a credible picture in his testimony. Although he knew he was not to give residents baths, he did it anyway. He was dishonest with the licensing agency when he took that action, offering no compelling reason for his dishonesty other than a tardy post hoc explanation that R.P. wanted him to do it. It appears more likely that the petitioner was the one who wanted to do it and was willing to break the rule to satisfy his desires. This incident casts a shadow of doubt that hangs over the rest of the petitioner's testimony making it impossible to credit his allegations over those of R.P.

15. Based on the credible testimony it is found that the petitioner did bathe R.P. and during the course of that bath touched his penis several times and pushed back the foreskin. It is also found that he touched the petitioner on his buttocks and between the upper legs in the course of drying him off. Finally it is found that the petitioner put his hands down R.P.'s pants and rubbed his leg and genitals. All of these actions were deliberate, unnecessary and performed against the will and without the consent of the disabled man, R.P.

ORDER

The Department's decision is affirmed.

REASONS

The Commissioner of the Department of Aging and Disabilities is required by statute to investigate reports regarding the abuse and exploitation of elderly and disabled persons and to keep those reports that are "substantiated" in a "registry" under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911. Within 30 days of notification that a report of abuse has been substantiated against him or her, an individual can apply to the human services board for a fair hearing on the grounds the report is unsubstantiated. *Id.* § 6906(d). Reports that are found to be unsubstantiated must be destroyed pursuant to 33 V.S.A. § 6906(e) and not entered in the Department's registry.

The statute which protects elderly and disabled adults, 33 V.S.A. § 6902, defines "exploitation" as follows:

As used in this chapter:

...

(7) "Exploitation" means:

...

(D) Any sexual activity with an elderly or disabled adult when the elderly or disabled adult does not consent or when the actor knows or should know that the elderly or disabled adult is incapable of resisting or declining consent to the sexual activity due to age or disability or due to fear of retribution or hardship.

As found above, the petitioner's conduct in this case clearly meets the above definition. Based on the above findings and conclusions, the Department's decision in this is affirmed.

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